

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 90-4-E - ORDER NO. 90-1108 ✓  
NOVEMBER 26, 1990

IN RE:	Semi-annual Hearing to Review	)	ORDER CORRECTING
	the fuel purchasing practices	)	LANGUAGE AND
	and policies of Carolina Power	)	DENYING PETITION
	and Light Company.	)	FOR REHEARING AND
		)	RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) by way of a Petition for Rehearing and Reconsideration of Order No. 90-961 filed on behalf of Nucor Steel, a Division of Nucor Corporation (Nucor or the Petitioner). Carolina Power & Light Company (CP&L or the Company) filed a request seeking corrections to Order No. 90-961, specifically Paragraph 23, dealing with the Company's responses to Interrogatories and later filed a Response to the Petition of Nucor. The Commission will herein address both the request of CP&L and the Petition of Nucor.

I.

CP&L'S REQUEST

Paragraph 23 of Order No. 90-961 noted the failure of CP&L to fully adhere to the time requirements for responses to discovery requests. The Commission specifically mentioned that the Company had not filed responses with the Commission to the Second Set of

Interrogatories propounded by Nucor or to the Second Set of Interrogatories propounded by the Consumer Advocate. According to CP&L and to the documentation attached to its request, the Company filed its responses to Nucor's Second Set of Interrogatories with the Commission on September 12, 1990. A thorough review of the Commission's files indicates that this is correct and that the documents were filed with the Commission as asserted by CP&L. CP&L further alleges that it never received the Second Set of Interrogatories from the Consumer Advocate, but did receive, inadvertently, a Petition to Intervene in an Insurance Commission proceeding--something totally outside the realm of this proceeding and this Commission's jurisdiction. The Commission undoubtedly was incorrect in its assertion that CP&L had not responded to the Second Set of Interrogatories filed by Nucor and the Consumer Advocate. Therefore, Order No. 90-961, Paragraph 23 is amended to delete the sentence "[m]oreover, the Commission notes that the Company had not filed responses with the Commission even as of the date of the hearing, to the Second set [sic] of Interrogatories propounded by Nucor to Carolina Power & Light or to the Second Set of Interrogatories propounded by the Consumer Advocate to the Company."

II.

NUCOR'S PETITION

Nucor's Petition for Rehearing and Reconsideration asserted several allegations of error on the part of the Commission, yet it agreed with the Commission in its finding of imprudency on the part of CP&L. Specifically, Nucor asserts error by the Commission in 1) reducing excess replacement fuel costs to reflect the planned two-week outage for emergency power supply testing and in consideration of CP&L's performance history, 2) excluding the introduction of evidence on the prudence of operating Robinson Unit No. 2 at 60% power, 3) not disallowing replacement fuel costs associated with the delays in the Brunswick refueling outage, 4) "ignoring" the recommendation of Nucor's witness Goins to set the fuel factor at 1.575 cents per KWH, 5) not ordering CP&L to pass profits on off-system sales through the fuel factor, and 6) not adopting Nucor's proposal that evaluation of fuel costs and modification to fuel factors should be limited to once a year.

A. Disallowance of replacement fuel costs associated with Brunswick training outage.

Nucor concurs with the Commission's finding in Order No. 90-961 that CP&L had "acted unreasonably as to the training of its Brunswick operators" and "failed to take reasonable steps to safeguard against...training errors" and that "this failure was the cause of outages at both Brunswick nuclear generating units." Nucor contends, however, that the Commission's determination to disallow a portion of the \$1,221,375 found as excess fuel

replacement cost to reflect a credit for a planned two week outage as well as the decision to further reduce this amount by 50%, contravene the applicable statute and are not supported by substantial evidence.

Specifically, the Commission found that before the operator training outage occurred, CP&L had been planning to shut down Brunswick Unit No. 1 in late June 1990 for emergency power supply testing. This testing was required by the Nuclear Regulatory Commission, and under the Brunswick Plant technical specifications it had to begin by June 23 at the latest. CP&L was able to carry out the emergency power supply testing during the operator training outage, eliminating the need for the planned late June outage. The Commission found that the fuel costs saved by eliminating this outage should be credited against the increased fuel costs attributable to the operator training outage, thus reducing costs of the operator training outage from \$1,221,375 to \$843,211 on a South Carolina retail jurisdictional basis.

Nucor contends that this finding was incorrect and should be reconsidered. In its Petition Nucor points out that CP&L had applied to the NRC on April 29, 1990, for an exception to the plant technical specifications, so as to allow the Company to delay the emergency power supply testing until the next refueling outage. This application was pending when the operator training outage occurred. Nucor asserts that if there had been no operator training outage, CP&L's application would have been granted by the NRC. Therefore, Nucor argues, the Company did not really save any

fuel costs by performing the emergency power supply testing during the operator training outage, and the costs of the planned two-week outage should not have been credited against the costs of the operator training outage.

Nucor creates a fiction by attempting to fashion an argument that the real issue is whether the testing and related two weeks down time would have been necessary had the training outage not occurred. Nucor misses the point with its speculative reasoning. The fact is that the Brunswick plant was already down and the requested waiver was withdrawn before the Nuclear Regulatory Commission (NRC) had the opportunity to act upon it. Nucor suggests that "it is 'highly likely' that the requested waiver would have been granted had CP&L's intervening imprudence not eliminated the need for it." Petition at 3. But, again, the fact is that no one will ever know (and Nucor admits this, too) what the NRC would have done since the request was withdrawn before the NRC had an opportunity to consider it.

Company witness Ronnie M. Coats testified (Tr. at 165-66) that at the time the operator training outage occurred, CP&L had received no formal or informal indication whatsoever from the NRC, either orally or in writing, as to whether its requested exception to the technical specifications would be granted. Witness Coats further testified (Tr. at 131) that "the request dealt with a system that has a high degree of sensitivity with the NRC." He noted (Tr. at 131-32) that by scheduling the emergency power supply testing outage for June 23, CP&L had already taken the maximum

possible degree of leeway allowed by the NRC, delaying the testing until 22 1/2 months after the previous test, rather than 18 months as the technical specifications normally contemplate. It serves no purpose to speculate, as Nucor witnesses William R. Jacobs, Jr. and Samuel H. Hobbs, Jr. did (Tr. at 232) that the NRC would have granted the exception requested by CP&L because it had granted similar exceptions to seven other utilities. Every case that comes before a regulatory agency is separate and distinct and must be decided on its own facts.

Nucor states in its Petition that there is "uncertainty" as to whether the Company's application to the NRC would have been granted, and that "any uncertainty should be borne by CP&L" since the Company has the burden of proof. Contrary to Nucor's suggestion, CP&L has carried its burden of proof. The Company has shown that under the plant technical specifications as established by the NRC, a two-week outage for emergency power supply testing had to begin by June 23; that although the Company had applied for permission to delay the outage, the NRC had given no formal or informal indication that a delay would be allowed; and that by performing the required testing during the operator training outage, the Company was able to dispense with the emergency power supply testing outage. There is no uncertainty and no speculation as to any of these facts. They entitle the Company to credit for the fuel costs avoided by eliminating the outage. The Commission properly found that CP&L should be allowed this credit, and there is no reason to reconsider this finding.

The Commission found that even though the excess fuel costs attributable to the operator training outage amounted to \$843,211 on a South Carolina retail jurisdictional basis, only half of these costs, or \$421,605.50, should be disallowed. In its Order, the Commission noted that during the test period, CP&L provided reliable service, operated its fossil units economically and efficiently, and operated its nuclear units at an overall capacity factor far above the national average, in spite of the problems that gave rise to the operator training outage.

Nucor contends that the Commission has no discretionary authority to reduce a fuel cost disallowance. Instead, according to Nucor, once the Commission finds that certain costs are attributable to unreasonable actions on a utility's part, it is compelled by S.C. Code Ann., §58-27-865 to disallow all of these costs.

The Commission has correctly interpreted S.C. Code §58-27-865. S.C. Code §58-278-865(A) provides:

Upon investigation...the Commission shall direct each company to place in effect in its base rate an amount designed to recover...the fuel costs determined by the Commission to be appropriate for that period, adjusted for the over-recovery or under-recovery from the preceding six-month period. [emphasis added.]

The use of the word "appropriate" indicates that the Legislature intended to allow the Commission a significant degree of discretion in setting fuel components in based rates, rather than requiring that rates be fixed mechanically on the basis of a mathematical formula. This is consistent with the Commission's past practice; in

previous CP&L fuel adjustment proceedings the Commission has consistently taken the position that the determination of the fuel factor is not a mechanical exercise but involves a degree of judgment.

S.C. Code Ann., §58-27-865(E) reads as follows:

The Commission shall disallow recovery of any fuel costs that it finds without just cause to be the result of failure of the utility to make every reasonable effort to minimize fuel costs or any decision of the utility resulting in unreasonable fuel costs, giving due regard to reliability of service, economical generation mix, generating experience of comparable facilities, and minimization of the total cost of providing service.  
[emphasis added.]

The Commission cannot ignore the phrase "without just cause," as Nucor seems to suggest. This phrase reinforces subsection (A) by indicating once again that there is a degree of discretion involved in setting the fuel factor. Here the Commission found that there was just cause to hold the Company responsible for only a portion of the operator training outage, in light of the fact that CP&L had provided reliable service, had operated its fossil generating plants efficiently, and had maintained a high capacity factor at its nuclear plants during the test period.

Of even greater importance is the participial phrase "giving due regard to..." at the end of subsection (E). This phrase, which modifies the verb "shall disallow," indicates that whenever the Commission proposes to disallow fuel costs it is required to consider the four listed factors--reliability of service, economical generation mix, generating experience of comparable



facilities, and minimization of the total cost of providing service. The statute does not, however, specify the exact manner in which these factors are to be considered, or the weight to be given to each factor. These matters are left to the Commission's discretion. In its Order in this case, the Commission fully complied with the statutory requirement and took into account each of the four factors listed in the participial phrase. The Commission has interpreted and applied §58-27-865 correctly, and the Commission's interpretation of a statute it is charged with applying is entitled to substantial deference. Dunton v. S.C. Board of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132, 133 (1987).

In addition to challenging the Commission's authority to reduce the amount of the disallowance, Nucor advances several miscellaneous complaints about the Commission's treatment of the operator training outage. Nucor asserts that the Commission ignored its witnesses' testimony about allegedly imprudent outages at CP&L plants prior to the test period, as well as their testimony objecting to the use of NERC data on national average capacity factors. The Commission did not ignore any of this testimony, but rather found it unpersuasive. Nucor's testimony as to outages in past years had virtually no relevance to the issue of whether the costs of the Brunswick operator training outage should be disallowed; and at pages 5-6 of Order No. 90-961 the Commission very clearly explained why the NERC national average capacity factor calculation is appropriate and the Nucor witnesses' adjusted

averages are unacceptable.

Accordingly, Nucor has failed to show any error in the Commission's decision to disallow \$421,605.50 of CP&L's fuel costs. There is no basis for reconsidering this decision.

B. Exclusion of evidence on the prudence of operating Robinson Unit No. 2 at 60% power.

CP&L's Robinson Unit No. 2 was shut down for repairs to the auxiliary feedwater system from August 22 through December 24, 1989. This outage occurred during the test period for the Company's spring 1990 fuel adjustment proceeding. The Commission reviewed the outage in that proceeding and found in Order No. 90-337 that the outage was not caused by management imprudence.

At the hearing, the Commission struck portions of the testimony of Nucor witnesses and precluded Nucor from presenting any other evidence related to the operation of Robinson 2 at 60% power during the test period. Order No. 90-961 at 2-3. According to the Order, this evidence was excluded on the grounds that the 1989 Robinson outage, which Nucor witnesses identified as also causing the 1990 reduced power operation, occurred "outside the six-month period at issue here, and had previously been ruled upon by the Commission in its Order No. 90-337 and was therefore irrelevant...." Id at 3. Nucor takes issue with the Commission's findings in this regard.

Nucor admits that without a doubt, "the 1989 Auxillary Feedwater Outage at Robinson occurred outside the test period in this case." Petition at 6. Nucor further admits that in view of

the facts, it does not dispute that the Commission cannot go back and disallow excess fuel costs from that proceeding and does not propose to do so. Rather, Nucor wishes to address the "reduced 60% power operation partial outage" which occurred in this test period in this proceeding and was a consequence of the 1989 outage. Nucor argues that the reasonableness of the costs of the 60% reduced power operation were not at issue before and could not have been addressed until this proceeding.

The exclusion of this testimony was entirely proper. The Commission had previously found that the Company had "not acted unreasonably" as to the outages investigated by the Commission Staff, which included the Robinson outage. To reopen this matter and investigate the consequences when the initial outage was not found to be imprudent would subject the Company to unforeseen and unreasonable situations. As pointed out by CP&L in its Response to Petition for Rehearing and Reconsideration, nuclear plants use fuel when they are running, but not during an outage. A nuclear unit can contain only a limited amount of fuel, and when its fuel is used up, it must shut down for refueling. Therefore, whenever any unplanned outage occurs, whether prudent or imprudent, the automatic and unavoidable result is that future refueling outages are delayed. If a refueling outage is delayed long enough that it moves from one test period to another, then fuel costs will decrease in the first test period and increase by a corresponding amount in the second.

CP&L also points out that the auxiliary feedwater outage

caused a delay in every future refueling outage for the entire lifetime of the Robinson unit, not just the 1990 outage. The next refueling outage at Robinson will probably occur in 1992. Under the theory espoused by Nucor, there would be nothing to prevent Nucor from coming before the Commission in a 1992 fuel adjustment proceeding and contending that absent the 1989 auxiliary feedwater outage, the 1992 refueling outage would have occurred in some other test period and CP&L's test-period fuel costs would have been lower. Thus, if the Commission accepts Nucor's theory, Nucor will be able to continue litigating the auxiliary feedwater outage for years to come.

The theory put forth by Nucor places the Company in an untenable situation and creates a burden on the Company to defend the consequences of a 1989 outage (where the Commission made a finding that the Company had not acted unreasonably) for the remainder of the life of Robinson Unit No. 2. This is unreasonable and the evidence submitted by Nucor in this regard was properly excluded by the Commission. Once the Commission ruled that the 1989 outage was not imprudent, it was not appropriate to reopen the issue.

C. Replacement fuel costs associated with the Brunswick refueling outage.

Brunswick Unit No. 2 was shut down for refueling and maintenance from September 9, 1989, through March 16, 1990. The outage was 15 days longer than originally planned. Nucor witnesses Jacobs and Hobbs testified (Tr. at 237-38) that they were "not

able to conclusively state that the outage extension resulted from imprudent or unreasonable actions by the Company." Nevertheless, they recommended that \$2,584,346 of the costs of this outage be disallowed, stating (Tr. at 239) that "we do not believe that the Company has demonstrated that these delays were reasonable."

Company witness Coats testified extensively concerning the reasons why the Brunswick refueling outage took a few days longer than planned (Tr. at 80-82, 134-45, 147-48). The Commission found that none of the delays in the outage were caused by management imprudence. Nucor contends that the Commission should reconsider and reverse this finding. In its Petition Nucor alleges that "CP&L simply did not establish that the delays were prudently incurred through reliable first-hand evidence." The Commission is of the opinion that the testimony of witness Coats supports the Commission's finding.

Nucor further contends that the Commission improperly shifted the burden of proof. In summarizing the Commission's discussion of this issue, Nucor says the Commission found "that a disallowance would be inappropriate since it had not been shown that these delays were the result of imprudent action." The Commission never suggested that its decision was based on Nucor's failure to make a showing of imprudence. Instead, Order No. 90-961 at p. 20 expressly states:

Our review of the facts presented as to the causes of these delays does not tend to indicate that they were the result of imprudent action, but rather tend to indicate that they were instead occasioned by the vagaries of equipment malfunctions and failures of human proficiency.

The Commission was fully aware that the burden of proof was on CP&L and never shifted it to Nucor, rather the Commission determined that the greater weight of the evidence supported its finding of no imprudence.

Nucor contends that its procedural rights were violated when Witness Coats was allowed to give additional direct testimony on the reasons for the delays in the Brunswick refueling outage. This contention is without merit. When Witness Coats submitted his prefiled testimony, he did not know that a prudence issue would be raised as to the refueling outage. When the Nucor witnesses challenged the prudence of this outage, Witness Coats was entitled to respond. He could have been called as a rebuttal witness after Witnesses Jacobs and Hobbs had completed their testimony. The purpose stated for addressing the issue during direct was in lieu of rebuttal testimony and in the interest of time. The Commission was fully within its rights in expediting the hearing by allowing Witness Coats to give additional direct testimony in lieu of rebuttal and in the interest of administrative efficiency. No prejudice resulted from this action.

Witness Coats testified on cross-examination (Tr. at 139-43) that CP&L employed General Electric (GE) to perform certain recirculation pipe replacement work during the Brunswick refueling outage. Under the terms of its contract GE agreed that it would complete the work in 40 days or pay a penalty. GE did not meet the 40-day deadline, and it paid CP&L a penalty of \$400,000 to

\$500,000. The Commission ordered its Staff to investigate the penalty and determine if any portion of it was related to fuel costs. Nucor contends that the Commission should reconsider this decision and order that the penalty be paid over to ratepayers immediately.

The Commission has not ruled against Nucor on this issue, but has only deferred its decision. No party will be prejudiced by allowing the Commission time for careful consideration of this matter. Additionally, since the Commission has not ruled on the merits, it is premature to challenge the Commission's decision to investigate the matter further. The issue is not ripe for appeal until the Commission has determined whether or not the penalty relates in any way to CP&L's fuel costs.

D. Recommendation of witness Goins to set the fuel factor at 1.575 cents per kwh

Nucor witness Dennis W. Goins testified that the fuel factor should be set at 1.575 cents per kWh, in comparison with the factors of 1.650 cents per kWh proposed by Commission Staff witness William O. Richardson and 1.675 cents per kWh proposed by Company witness Dale M. Bouldin. The Commission chose to set the fuel factor at 1.650 cents per kWh, and Nucor complains that the Commission ignored Witness Goins' testimony.

The Commission was fully aware of Witness Goins' testimony and did not ignore it. In calculating his fuel factor Witness Goins relied heavily upon the recommendations of Nucor witnesses Jacobs and Hobbs concerning the outages at the Brunswick and Robinson

Plants. The Commission found the proposals of these two witnesses unacceptable, therefore, Witness Goins' proposed fuel factor was also unsatisfactory.

E. Treatment of profits from off-system sales

Nucor witness Goins recommended that profits from CP&L's off-system sales be shared with the ratepayers through the fuel clause. The Commission, in responding to this issue, directed the Commission Staff to specifically examine this issue in each fuel clause proceeding and include language in its audit procedures to address the issue and any potential problems. As to Mr. Goins' recommendation that the Commission should investigate ways to allow the ratepayers to share in profits from such sales, the Commission found in Order No. 90-961 that profits from anticipated sales are taken into account and credited to the ratepayer in the setting of rates and charges. Nucor alleges there is not evidence in the record to support this finding.

The Commission's finding in regard to the profits from off-system sales is merely a recognition of the Commission's ratemaking treatment. Substantial evidence in the record is not required of a judicially or administratively cognizable or noticable fact, particularly one within the direct purview of the Commission. Nucor merely disagrees with the Commission's finding that the current ratemaking treatment takes into account profits from off-system sales. There is no reason to reconsider this finding in the context of this proceeding.



F. Proposal to evaluate fuel costs and modification to fuel factors be limited to once a year.

During the hearing before the Commission, witness Goins recommended that the Commission limit adjustments of the base fuel factor to once a year on the grounds that a six-month evaluation is inefficient and biased against the ratepayers. The Commission pointed out that pursuant to S.C. Code Ann., §58-27-865 (Cum. Supp. 1989), fuel adjustment hearings are required on a six-month basis. See, §58-27-865(A). The Commission agrees with Nucor that the statute only requires hearings to be held every six months and that it does not require the fuel factor to be changed. However, the intent of the statute and the clear meaning of the statute read as a whole requires a six-month period of review and that the base fuel factor will be subject to adjustment as a result of information put before the Commission at the hearing. The proposal of Nucor is contrary to the meaning of the law. The Commission's interpretation of §58-27-865 is entitled to substantial deference. Dunton, supra.

III.

CONCLUSION

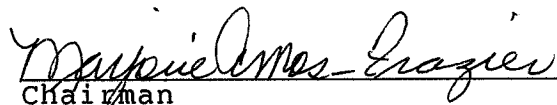
The Commission has carefully considered the Petition for Rehearing and Reconsideration filed on behalf of Nucor and finds that it should be denied. Nucor has not pointed to any deficiencies in Order No. 90-961 which would require the Commission to rehear, reconsider or otherwise modify Order No. 90-961. The Commission is of the opinion that Order No. 90-961 is based upon

law, logic, fact and the substantial evidence of the whole record and that Nucor's Petition alleging error should be denied. As to CP&L's request to amend Order No. 90-961 to accurately reflect the Company's responses to the Second Set of Interrogatories filed on behalf of Nucor and the Consumer Advocate, the Commission finds that Order No. 90-961 should be amended as determined herein.

IT IS THEREFORE ORDERED:

1. That the Petition for Rehearing and Reconsideration filed on behalf of Nucor Steel, a Division of Nucor Corporation is hereby denied.
2. That Order No. 90-961 shall remain in full force and effect as originally promulgated except as modified herein.
3. That this Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED:

  
Chairman

ATTEST:

  
Executive Director

(SEAL)